

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Issuance of Nationwide Permits; Notice; Correction

AGENCY: Army Corps of Engineers, DoD.

ACTION; final notice; correction

SUMMARY: This document contains corrections to the final notice of issuance of Nationwide Permits (NWP) which was published in the Federal Register on Tuesday, January 15, 2002 (67 FR 2020 – 2095).

ADDRESSES: HQUSACE, ATTN: CECW-OR, 441 “G” Street, NW. Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, at (703) 428-7570, Mr. Kirk Stark, at (202) 761-4664 or Ms. Leesa Beal at (202) 761-4599 or access the U.S. Army Corps of Engineers Regulatory Home Page at:

<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

SUPPLEMENTAL INFORMATION: In the SUMMARY section on page 2020, the third and fourth sentences are corrected to read: “All NWPs except NWPs 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 expire on February 11, 2002. Existing NWPs 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 expire on March 18, 2002.” In the last sentence of the SUMMARY section, the expiration date is corrected as “March 18, 2007”, instead of “March 19, 2007”.

On page 2020, in second sentence of the DATES section, the expiration date is corrected as “March 18, 2007”, instead of “March 19, 2007”. Therefore, the NWPs

published in the January 15, 2002; Federal Register will expire on March 18, 2007, five years from their effective date of March 18, 2002.

On page 2020, in the fifth paragraph of the “Background” section, the third and fourth sentences are corrected to read: “All NWP’s except NWP’s 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 expire on February 11, 2002. Existing NWP’s 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44 expire on March 18, 2002.” The expiration date in the last sentence of this paragraph is corrected as “March 18, 2007”, instead of “March 19, 2007”.

On page 2020, the paragraph in the section entitled “Grandfather Provision for Expiring NWP’s at 33 CFR 330.6” is corrected to read: “Activities authorized by the current NWP’s issued on December 13, 1996, (except NWP’s 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44), that have commenced or are under contract to commence by February 11, 2002, will have until February 11, 2003, to complete the activity. Activities authorized by NWP’s 3, 7, 12, 14, 27, 39, 40, 41, 42, 43, and 44, that were issued on March 9, 2000, that are commenced or under contract to commence by March 18, 2002, will have until March 18, 2003, to complete the activity.”

On page 2020, in the “Clean Water Act Section 401 Water Quality Certification (WQC) and Coastal Zone Management Act (CZMA) Consistency Agreement” section, the date in the fifth sentence is corrected as “February 11, 2002”, instead of “February 11, 2001”.

On page 2023, third column, last sentence, the number 29 is replaced with the number 19, because this sentence refers to General Condition 19.

On page 2024, first column, in the fourth sentence of the last paragraph the phrase “less than” is replaced by “greater than” because the 30 day completeness review period

for NWP pre-construction notifications is greater than the 15 day completeness review period for standard permit applications.

On page 2031, second column, second full paragraph, the number 31 is replaced with the number 3 because this paragraph refers to NWP 3.

On page 2044, second column, fourth complete paragraph, the title is corrected to read “Stream and Wetland Restoration Activities” because that is the title of NWP 27.

On page 2054, second column, the year cited in the third sentence of the second paragraph is the year 2000, not 1996.

On page 2058, third column, in the second sentence of the second complete paragraph the word “intermittent” is inserted before the phrase “stream bed” because the waiver for filling or excavating greater than 300 linear feet of stream beds can apply only to intermittent stream beds.

On page 2072, third column, last sentence, the number 19 is inserted after the term “General Condition” since this sentence refers to General Condition 19.

On page 2076, second column, the street address for the Walla Walla District Engineer is corrected to read “201 N. Third Avenue”.

On page 2080, second column, third paragraph from the top of the column (in the “Notification” section of NWP 12), the word “or” at the end of paragraph (e) is deleted and the period at the end of the fourth paragraph (paragraph (f)) is replaced with “; or”.

On page 2080, second column, paragraph (a) of NWP 13 is corrected to read: “No material is placed in excess of the minimum needed for erosion protection;” The change was not intended and we are correcting this paragraph by reinstating the original text as it

appeared in the version of NWP 13 published in the December 13, 1996, Federal Register (61 FR 65915).

On page 2080, third column, the word “or” is inserted at the end of paragraph (a)(1) of NWP 14, Linear Transportation Projects. Paragraph (a) of NWP 14 is corrected to read: “a. This NWP is subject to the following acreage limits: (1) For linear transportation projects in non-tidal waters, provided the discharge does not cause the loss of greater than 1/2-acre of waters of the US; or (2) For linear transportation projects in tidal waters, provided the discharge does not cause the loss of greater than 1/3-acre of waters of the US.”

On page 2085, second column, the last sentence of NWP 36 is corrected to read as follows: “Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to section 10 if located in navigable waters of the United States.” The change was not intended and we are correcting this paragraph by reinstating the original text as it appeared in the version of NWP 36 published in the December 13, 1996, Federal Register (61 FR 65919).

On page 2086, in the second full paragraph of the second column, “paragraph (e)” in the second sentence is replaced with “paragraph (f)” and “paragraph (i)” in the third sentence is replaced with “paragraph (j)” to accurately cite the previous paragraphs of NWP 39. The last two sentences of the paragraph before the subdivision paragraph were incorrectly divided into two sentences from the original single sentence and identified as being related to General Condition 15. This change was not intended and we are correcting this paragraph by reinstating the original last sentence as it exists in the March 9, 2000, text of NWP 39 (65 FR 12890).

On page 2086, middle column, the parenthetical statement at the end of the Note at the end of NWP 39 is corrected to read “* * * (except for ephemeral waters, which do not require PCNs under paragraph (c)(2), above; however, activities that result in the loss of greater than 1/10 acre of ephemeral waters would require PCNs under paragraph (c)(1), above).” The addition to the Note was intended to clarify that under paragraph (c)(2) only the loss of ephemeral open waters were not included in the requirement for a pre-construction notification (PCN). However, under paragraph (c)(1) all ephemeral waters of the United States are included in the measurement for the 1/10 acre PCN requirement. The correction is needed because the statement in the parentheses could be incorrectly interpreted to apply to paragraph (c)(1) and possibly to all PCNs, not just those affected by paragraph (c)(2).

For clarity, we are providing the text of NWP 39 in its entirety, with the corrections described above:

39. Residential, Commercial, and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP.

Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are authorized, provided the activities meet all of the following criteria:

- a. The discharge does not cause the loss of greater than 1/2-acre of non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters;
- b. The discharge does not cause the loss of greater than 300 linear-feet of a stream bed, unless for intermittent stream beds this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;
- c. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:
 - (1) The discharge causes the loss of greater than 1/10-acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters; or
 - (2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note, below); or
 - (3) The discharge causes the loss of greater than 300 linear feet of intermittent stream bed. In such case, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse

environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

e. The discharge is part of a single and complete project;

f. The permittee must avoid and minimize discharges into waters of the US at the project site to the maximum extent practicable. The notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the US were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the US. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the US. If an applicant asserts that the adverse effects of the project are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;

g. When this NWP is used in conjunction with any other NWP, any combined total permanent loss of waters of the US exceeding 1/10-acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

h. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);

i. For discharges causing the loss of 1/10-acre or less of waters of the US, the permittee must submit a report, within 30 days of completion of the work, to the District

Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage of the loss of waters of the US (e.g., 1/12-acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the US (e.g., 1/12-acre of emergent wetlands created on-site);

j. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers next to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. The compensatory mitigation proposal that is required in paragraph (f) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (j) of this NWP will be determined on a case-by-case basis by the District Engineer for addressing water quality concerns. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was previously used for agricultural purposes and the farm owner/operator used NWP 40 to authorize activities in waters of the United States to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities in waters of the United States on the project

site in excess of the acreage limit for NWP 39 (i.e., the combined acreage loss authorized under NWPs 39 and 40 cannot exceed 1/2 acre).

Subdivisions: For residential subdivisions, the aggregate total loss of waters of US authorized by NWP 39 can not exceed 1/2-acre. This includes any loss of waters associated with development of individual subdivision lots. (Sections 10 and 404)

Note: Areas where wetland vegetation is not present should be determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the US based on this criterion would require a PCN although water is infrequently present in the stream channel (except for ephemeral waters, which do not require PCNs under paragraph (c)(2), above; however, activities that result in the loss of greater than 1/10 acre of ephemeral waters would require PCNs under paragraph (c)(1), above).

On page 2088, in the sixth sentence of the first paragraph in the first column, the phrase “an adequate water quality management plan” is replaced with the phrase “adequate water quality management measures” to reflect the modified language in General Condition 9. This sentence is corrected to read “The facility must have adequate water quality management measures in accordance with General Condition 9, such as a stormwater management facility, to ensure that the recreational facility results in no substantial adverse effects to water quality.”

On page 2089, first column, the second sentence of paragraph (c) of NWP 44 is corrected to read “Normally, the water quality management measures required by General Condition 9 should address these impacts;”. In addition, the second sentence of paragraph (i) of NWP 44 is corrected to read “ Further the District Engineer may require

water quality management measures to ensure the authorized work results in minimal adverse effects to water quality;” These corrections are necessary to reflect the modified language in General Condition 9.

On page 2089, third column, the text of General Condition 6 is corrected to read: “The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state or tribe in its Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination.” The change to General Condition 6 that was published in the January 15, 2002, Federal Register was not intended and we are correcting this sentence by reinstating the original text as it existed in the March 9, 2000, NWP.

On page 2090, first column, the word “Section” in the parenthetical at the end of General Condition 10 is replaced with “33 CFR” so that the parenthetical reads “(see 33 CFR 330.4(d))”.

On page 2090, at the top of the second column, the second Internet URL is replaced with “* * * http://www.nmfs.noaa.gov/prot_res/overview/es.html * * * ” because the Internet address for the National Marine Fisheries Service home page for endangered species has been changed.

On page 2090, third column, in paragraph (b)(4) of General Condition 13, NWP 40 should be added to the list of NWPs that require submission of delineations of special aquatic sites with pre-construction notifications. Therefore, paragraph (b)(4) of General Condition 13 is corrected to read “For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including

wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));”

On page 2090, third column, in paragraph (b)(6) of General Condition 13, the word “Projects” replaces the word “Crossings”, because the title of NWP 14 is “Linear Transportation Projects”.

On page 2090, third column, in paragraph (b)(8) of General Condition 13, the word “Activities” is inserted after the word “Restoration” because the title of NWP 27 is “Stream and Wetland Restoration Activities”.

On page 2091, first column, in paragraph (b)(10) of General Condition 13, the word “Projects” is replaced with the word “Facilities” because the title of NWP 31 is “Maintenance of Existing Flood Control Facilities”.

On page 2094, third column, we are correcting the definition of “Loss of Waters of the US” by deleting the last sentence and inserting the following sentence after the fourth sentence of this definition: “* * * Impacts to ephemeral streams are not included in the linear foot measurement of loss of stream bed for the purpose of determining compliance with the linear foot limits of NWPs 39, 40, 42, and 43. * * *”

Due to the number of corrections made to the definition of “Loss of Waters of the US”, we are providing the text of this definition in its entirety, with the corrections described above:

Loss of Waters of the US: Waters of the US that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area

to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the US is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Impacts to ephemeral streams are not included in the linear foot measurement of loss of stream bed for the purpose of determining compliance with the linear foot limits of NWPs 39, 40, 42, and 43. Waters of the US temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the US.

In the January 15, 2002, Federal Register, it was stated that the definition was being revised (to clarify that ephemeral waters and streams are not included in the acreage or linear thresholds for NWPs) to comport with language in the preamble of the March 9, 2000 Federal Register notice. However, the language in the preamble of the March 9, 2000 Federal Register notice (65 FR 12881, third column) does not support this revision. Rather, the referenced preamble states, “During our review of the comments received in response to the July 21, 1999, Federal Register notice, we found an error in the proposed definition of the term, “loss of waters of the United States.” In the fourth sentence of the draft definition, we stated that the loss of stream bed includes the linear feet of perennial or intermittent stream bed that is filled or excavated. This statement is inaccurate because ephemeral stream bed that is filled or excavated can also be

considered a loss of waters of the United States. However, the 300 linear foot limit for stream beds filled or excavated does not apply to ephemeral streams. We have modified this sentence to define the loss of stream bed as the linear feet of stream bed that is filled or excavated.” Thus, the modification of this definition was intended to clarify that activities that involve filling or excavating ephemeral streams are not included in the linear foot limits for filling or excavating stream beds in NWPs 39, 40, 42, and 43. However, it was not intended to exempt ephemeral waters or streams from calculations of impacted acreages to determine PCN or maximum acreage requirements in accordance with NWPs 39, 40, 42, and 43.

In the August 9, 2001, Federal Register notice (66 FR 42099) we proposed to modify the definition of “Loss of Waters of the US” by adding the sentence “* * * The loss of stream bed includes the linear feet of perennial stream or intermittent stream that is filled or excavated. * * *”. The proposed change was in response to a commitment to clearly state in the text of the NWPs (which includes the definitions) that the 300 linear foot limit in NWPs 39, 40, 42, and 43 for filling and excavating stream beds would only apply to intermittent and perennial streams, not to ephemeral streams.

In the January 15, 2002, Federal Register notice (67 FR 2074 – 2075) we erroneously stated that both the acreage and linear limits of the NWPs do not apply to ephemeral waters. This was never intended to be adopted as policy for the NWPs or the Corps regulatory program. As previously stated, in the first column of page 2075 of the January 15, 2002, Federal Register notice, we refer to page 12881 of the March 9, 2000, Federal Register notice, which only discusses the 300 linear foot limit, not the acreage limits of the NWPs. Our intent is to continue to apply acreage limits of NWPs to

activities that result in the permanent loss of ephemeral waters, but the linear foot limits of the NWP's (i.e., NWP's 39, 40, 42, and 43) for filling or excavating stream beds would not apply to activities that involve filling or excavating ephemeral streams. The last sentence of the definition of "Loss of Waters of the US" as published in the January 15, 2002, Federal Register notice does not comport with remainder of this NWP package. Therefore, we are correcting this definition as described above.

We believe that correcting the text of NWP 39 and the definition of "Loss of Waters of the US" through the publication of this correction notice is appropriate. Nevertheless, in order to give all interested parties further opportunity to comment on this matter, we intend to publish a Federal Register notice to solicit public comments on those two corrections. If we determine that any other matter relating to the final NWP's requires correction or clarification, but that matter was not adequately dealt with in this correction notice, we will address that additional matter in the forthcoming Federal Register notice, as well. We expect to publish that Federal Register notice within a few weeks.

Date: _____

Approved By: _____

Lawrence A. Lang

Assistant Chief, Operations Division

Directorate of Civil Works